IN THE

Supreme Court of the United States

October Term, 1971

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 71-1043

SAUL HELLER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN RESPONSE TO THE PETITION FOR CERTIORARI

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Preliminary Statement

This brief is in response to a petition for a writ of certiorari which seeks to review a judgment of the Court of Appeals of the State of New York, entered December 1, 1971, which affirmed a judgment of the Appellate Term, First Department, entered July 15, 1970, which affirmed a judgment of the Criminal Court of the City of New York, New York County, rendered September 17, 1969, convicting

Saul Heller of Obscenity (N.Y. Penal Law §235.05), and sentencing him to pay a fine of two hundred fifty dollars or to serve thirty days in jail. The fine was paid.

Questions Presented

Whether a state judge who has seen an allegedly obscene film may issue a search warrant for its seizure without conducting a prior adversary hearing on the issue of obscenity.

Whether the New York courts properly applied constitutional standards in judging the film "Blue Movie" obscene.

Statement of the Case

On July 31, 1969 Judge GOLDBERG of the New York Criminal Court, at the request of an assistant district attorney of New York County, attended a performance of "Blue Movie" at the Garrick Theatre in Manhattan.

Immediately after the showing of the entire film, and without any discussions with the accompanying police inspector, Judge Goldberg stepped out of the theater, and signed a search warrant for the seizure of the film, and three arrest warrants, because "it was, and is my opinion that that film is obscene, and was obscene as I saw it under the definition" (Goldberg, 14-15, 20; see Smyth, 27, 30, 36, 46).* No one at the theater was notified prior to the issuance of the warrants (Goldberg, 23).

* References, unless otherwise noted, are to the pages of the record on appeal in the New York Court of Appeals.

The film was seized. The three "John Doe" arrest warrants were for the petitioner, Saul Heller, the theater manager, and two employees—the ticket taker and the projectionist, Susan Epstein and Mark Kern. The film was seized and was the subject of the instant obscenity charge. The cases against Epstein and Kern were dismissed on the prosecutor's motion (7-8).

Trial was held before a panel of three judges on September 16 and 17, 1969. The People's proof consisted of the evidence concerning the seizure and the film itself. The following summary of the film's content, prepared by respondent's counsel, is for the Court's convenience.

"Blue Movie" consists of three reels of color film which run for over one hour and forty-five minutes, excluding interruptions. The movie can perhaps be divided into five major sections, *i.e.*, pre-coital, intercourse, post-coital, dinner and shower scenes.

The movie opens without any titles or credits and the only actors in the film appear fully clothed—the female in pants and a diaphanous blouse, the male in a shirt, a pair of pants and socks—on a set which consists solely of one large bed. During the extended pre-coital and intercourse scenes (approximately 45 minutes), the actors undress themselves and are pictured lying in bed. During this "petting" sequence, the actors fondle each other, undress and continue fondling each other. The actors' genital regions are explicitly shown as they repeatedly manipulate each other's genital organs.

The actors then engage in sexual acts of real or simulated intercourse. One scene displays the female astride

the male fondling his penis and then attempting to insert the semi-erect organ into her vaginal area. After turning to a male-superior position, shown in a sequence with the camera turned toward the couple from between their feet, the copulating couple turns so that the male is portrayed in profile on top of the female engaged in an act of intercourse. During these scenes, the camera is stationary and there is no close-up photography. However, the actors do express an awareness of the existence of the camera by commenting on this fact in their conversations. Throughout the entire scene the actors converse on diverse topics concerning a variety of mundane topics—*e.g.*, what they did during the past week, with whom they had previously had intercourse, impressions of mutual friends. Some of these conversations are not understandable because the sound track is unintelligible or non-existent. The judges at the trial level indicated that they could not understand the sound and at points remarked that "the sound is dead * * * although we can observe the actors are talking to each other" (48).

During the entire post-coital period (approximately twenty-five minutes), the two participants are pictured unclothed and fondling each other's genital organs. Their genital regions are explicitly shown. The couple engage in conversation, which is sometimes hard to hear because the sound is distorted, the topics range from the Vietnam War to the qualifications of Mayor Lindsay. The topics shift, following no particular pattern, and showing no insight, few ideas, and nothing beyond the thoughts in newspaper headlines.

The actors dress and prepare a meal. Parts of the sound track are unintelligible or non-existent during this period.

Finally, the couple undress and shower themselves. During this sequence (approximately twenty minutes), the actors are explicitly shown engaging in mutual manual genital stimulation. The camera "technique" shifts from the static single-distance pictures to a series of close-ups of portions of the male and female anatomy. Several acts of either actual or simulated intercourse occur in the bathtub, while the couple sing a "song" whose only clearly identifiable line is "down on me." At the end, during actual or simulated intercourse, they make loud animal noises. There are no closing titles or credits.

The defense called three expert witnesses. One, Parker Tyler, a 65-year-old author of six books about motion pictures, who had occasionally written magazine articles and given lectures about films, had seen "Blue Movie" about a year before the trial and had written a chapter about it in one of his books. The movie, produced by Andy Warhol, "represents what might be called the attitude of the cool world toward sex" (72-80). The "cool world" is "an attitude of indifference to the emotions, of taking everything in a perfectly cool way. I think that is the way sex is taken in the film in question. Sex is not represented as anything very exciting or extraordinary. It is an ordinary common event, and it is mixed in with conversation, gossip, it is no more than a diversion, a distraction" (89-91, 96-7). This attitude is displayed "through the acts" and the topic of conversation is "irrelevant and immaterial" (87). There

is no story line or plot line (87-8); the dialogue in Warhol films is usually improvised (92). The witness did not find the movie sexually stimulating, lewd," agreeing that "the picture that merely titillates * * * is lewd, but a picture that actually shows copulation is not lewd" (91-2). The "spirit" of the picture and the fact that "the woman seems quite bored [and] gives very little cooperation to the man" distinguishes the film from the "sexploitation" movies (93-4).

The term "blue movies" has a special meaning in the motion picture industry; in "common parlance" the term applies to "stag movies" (Tyler, 82-4; *see also,* Winick, 110-11). In the advertising the film was called "Blue Movie" although the original name was "Fuck" (Tyler, 83-4).

The second expert, Charles Winick, a 47-year-old professor of sociology at the City University who had been a consultant to numerous commissions studying the effects of mass communications on children, and who had written numerous articles and books, testified that in his opinion "Blue Movie" had a social value (99-104); it shows "a growing and important point of view about sexual behavior * * * a film which enables people to explore their own attitudes in a constructive way," and "it has a certain amount of clinical interest in the presentation of two different character types, a non-responsive woman * * * and an aggressive fellow" (104-5).

The movie showed that the woman was not cooperative "to the extent that her boy friend appeared to wish"

1, 124). Although the witness was uncertain whether re was actual penetration, because of the lack of close-, "I would say that it is likely that in fact they had en-ged in sexual intercourse." He would also say that it s the intention of the film to convey the impression that y had (106-7). The movie has value in clinical classes nedical school or for psychiatric residents. At first the ness stated he would not present it to a college age up; he later changed his mind (121-3). Essentially, ce the sex act was presented without frills, and was trayed realistically, his "own feeling is that it would arly be a sexual depressant"; "a realistic showing of act of intercourse would not titillate the public" (105-6, -10, 129-35). The conversation between the actors does "lend credence to the socially redeeming value," but ws the jumping about between topics that actually urs during intimate moments; the particular topics dis-sed "is extremely important" (112-14). The actors wed a consciousness of being filmed; indeed, on occasion y spoke about the movie or concerning a particular w; thus the audience relates to the film's director (114-. The movie emphasizes the realism in the incident, hout accenting the highs and lows of the sexual experi-e (113, 118-19). The uneven sound track and occasional k of focus help convey the sense of reality (127-8).

The other expert, Thomas Phillips, a 27-year-old writer radio station WQXR and various publications, testified t he had written an article about "Blue Movie" for The lage Voice; he believed that the movie had social value, t is, it was "about the political and social situation in s country today" (141-3, 171-2). The movie conveyed

the actors' disaffection with society and their "powerlessness" to control it; their solution was "to stay home, to refuse to contend with the situation and to find what happiness you can in private personal relationships" (143-4, 147-8, 158-69). The witness noted that the film contained "a great deal of conversation" (148). The sound track was designed to be partly inaudible because it portrayed realism (145-6). There was, however, "an organic connection between the sexual intercourse scene and the political scene. To express it very succinctly, * * * I think the sexual intercourse was an emblem of the alternative of struggling against corruption and disorder in society" (153-4). "It was a very benign view of sexual intercourse in a friendly case [*sic*]" (154-6). In response to a question from the Presiding Judge, "Could you say that the * * * photographic depiction of the intercourse, and the manipulation of the male's private organ, was a tasteful way of showing the actors' dissent with taxes, war and politics?", the witness replied, "I think that it was a tasteful thing * * * [because] it was so realistic that it was relatively normal compared to the hysteria and exaggeration that appear in the cleverly censored sex films" (164-5).

The petitioner testified that he had been the manager of the Andy Warhol Garrick Theatre for two years. He stated that when "Blue Movie" was playing at his theater there had been a sign at the box office with an "X" and a notice that no one under 17 was admitted (177-9). Mr. Heller instructed each of the employees, ticket cashers and ushers, that persons obviously under 18 years old were to be excluded (180-4). He had seen the picture before his arrest (183).

At the end of the People's case and at the end of the entire case petitioner moved to dismiss, emphasizing the alleged constitutional defects in the search-and-seizure procedure. The petitioner was found guilty by a unanimous court, which rendered the following opinion:

> "The Presiding Judge: We have listened with great interest to the testimony, and the very able argument by counsel on both sides.
>
> "It is the conclusion of the Court that the motion to dismiss is denied, that the defendant is found guilty.
>
> "We would like to call to your attention, that with respect to the due process clause violation urged by Counsel, that there was a judicial scrutiny by a judge of this Court prior to the issuance of the warrants, and I refer you to Marcus versus Search Warrant in the United States Supreme Court.
>
> "With respect to the absence of adversary proceeding as provided in the [former N.Y.] Code of Criminal Procedure, Section 22a, I think we are in agreement, Counsel has indicated there is no provision for an adversary proceeding under that section with respect to motion picture films.
>
> "We find that the motion picture in question is hard core pornography, see People versus Richmond County News * * * New York 2nd 578. Hard core pornography is obscene by any standard, see Womack versus United States 294 F. 2nd at pages 204 and 206. Sexual activity between male and females graphically portrayed absent any social justification or excuse is obscene. See the decision in People versus G.I. Distributors at 20 New York 2nd 104, under the test for obscene which modifies the Roth decision alluded to by Counsel, we have the case of Memoirs versus Massachusetts commonly called the Fanny Hill case at 383 U.S. 413, and as far as the matter there, in issue, one of the tests that are in issue here is whether the work

> and material in question has redeeming social value. That statement in the Memoirs case, the Fanny Hill case, is that the work in question must be utterly without redeeming and emphasizing redeeming, redeeming social value. The expert testimony in this case presented by the defendant is not persuasive." (214-16).

The petitioner was thereafter sentenced to pay a fine of $250 or to serve thirty days in jail. He paid the fine.

On appeal to the Appellate Term, Heller contended that since the film is not obscene the court below incorrectly found him guilty. He also argued that the film should not have been seized pursuant to a search warrant, because he was not given an opportunity for an adversary hearing prior to the issuance of the warrant.

The Appellate Term, after seeing the film, affirmed the conviction, without opinion. One justice dissented on the ground that the film was not obscene.

On appeal to the New York Court of Appeals, petitioner again argued that an adversary hearing rather than an *ex parte* judicial determination is necessary before an obscene film may be seized. He also asserted that "Blue Movie" is not obscene.

In that Court, the five-judge majority, after having viewed the film, found it to be obscene. The majority also rejected the argument that this Court's decision mandates an adversary hearing prior to the issuance of a search warrant for allegedly obscene films, particularly where the issuing magistrate has personally seen the film in question. The contrary view of the United States Court of Appeals for the

Second Circuit, in *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (1969), *cert. denied* 397 U.S. 920 (1970) and *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (1970), was rejected as "beyond any requirement imposed on State courts by the Supreme Court." *People* v. *Heller*, 29 N.Y.2d 319 (1971). The two-judge dissenting opinion, written by the Chief Judge, contends that the film is not obscene and that the search and seizure issued need not be reached.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1657(3).

ARGUMENT

POINT I

The writ of certiorari should be granted to determine whether a state judge, who has seen a film, may properly issue a search warrant for its seizure without conducting a prior adversary hearing on the issue of obscenity.

This case presents the Court with a proper record upon which to resolve an issue of great concern to law enforcement in the area of obscenity law: must a person being charged with promoting obscenity be accorded a hearing prior to the issuance of a search warrant authorizing the seizure of an allegedly obscene film? The question was recently before this Court, but was not reached. *Rabe* v. *Washington*, No. 71-247, —— U.S. —— (March , 1972). In the case at bar, the New York Court of Appeals held that an adversary hearing was unnecessary. *People* v. *Heller*, 29 N.Y.2d 319. The United States Court of Appeals

for the Second Circuit has said that one is, *Bethview Amusement Corp.* v. *Cahn*, 16 F 2d 410 (1969), *cert. denied* 397 U. S. 920 (1970); *Astro Cinema Corp.* v. *Mackell*, 422 F 2d 293 (1970). The difference in conclusions and results on this federal constitutional issue, rendered by two highly respected courts in the same jurisdiction, is one that is best resolved by this Court.

This issue is now ripe for adjudication. It is squarely presented by this case. It is not likely that the federal courts in this Circuit will agree with New York State's highest court's interpretation of this Court's decisions in *Marcus* v. *Search Warrants*, 367 U. S. 717 (1961), *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964), and *Lee Art Theatres, Inc.* v. *Virginia*, 392 U. S. 363 (1968). Indeed, subsequent to the decision in the New York Court of Appeals in the case at bar, the federal courts in this circuit have adhered to their prior view. See, *e.g. MOD Amusement Corp.* v. *Murphy*, 335 F. Supp. 1267 (S.D.N.Y.) motion for stay denied Jan. 12, 1972 (2d Cir.). Those cases, which present other issues [*cf., e.g., Younger* v. *Harris*, 401 U. S. 37 (1971); *Byrne* v. *Karelexis*, 401 U. S. 216 (1971)], would not present as clear a record as does the case at bar, on the constitutional issues regarding the seizure of the film.

Not only is there an irreconcilable disagreement between the state and federal courts, but the issue is one of practical importance. Nearly all obscenity prosecutions require the production, in court, of the corpus. In an area such as New York City, which is inundated with smut of all descriptions, law inforcement requires the use of some speedy, effective

device for that production. The State's highest court and Legislature have authorized the issuance of search warrants, coupled with prior judicial scrutiny of the material, for that purpose. The federal courts have encumbered the procedure by requiring a prior adversary hearing.

POINT II

The New York state courts properly applied constitutional standards in determining the film to be obscene; no substantial constitutional question warranting review is presented.

The trial court and state appellate courts, each after seeing the entire film, found that "Blue Movie" was obscene under the New York Penal Law. The only substantial question concerning the film's obscenity is whether the proper standards were applied. Petitioner, although contending that the courts below misinterpreted the constitutional tests (petition, pp. 10-11), has shown nothing to establish that claim. The state courts properly applied the statutes and constitutional law that govern the case.

The New York statute contains the proper ascertainable standards of guilt. Section 235.05 of the New York Penal Law states that:

> "A person is guilty of obscenity when, knowing its contents and character, he:
> 1. Promotes, or possesses with intent to promote any obscene material; * * *"

The term "obscene" is defined in Penal Law Section 235.00(1) as follows:

> "* * * Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal

> is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

These statutory provisions reflect precisely the standards contained in this Court's decisions governing obscenity prosecutions. *New York Feed Co., Inc.* v. *Leary*, 397 U.S. 98 (1970), *affirming Milky Way Productions, Inc.* v. *Leary*, 305 F. Supp. 288 (S.D.N.Y. 1969) (three-judge court). "That §235.00 of the New York Penal Law conforms to the standards of *Roth* and the cases following that decision is beyond question." *Overstock Book Company* v. *Barry*, 436 F.2d 1289, 1293 (2d Cir. 1970). These decisions hold that three elements must be proven. The prosecution must establish that (a) the dominant theme of the material taken as a whole appeals to prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. *Redrup* v. *New York*, 386 U.S. 767 (1967); *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966); *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964); *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (1962); *cf. United States* v. *35mm Motion Picture Film Entitled "Language of Love,"* 432 F.2d 705 (2d Cir. 1970). As indicated by the drafters of the Penal Law, the definition of "obscenity" contained in Section 235.00(1) incorporates fully and is

identical to the federal standards enunciated in *Roth, Jacobellis, Redrup* and *Manual Enterprises, supra.* See Denzer and McQuillan, *Practice Commentary, N.Y. Penal* Law §235.00, McKinney ed., pp. 86-90. "Obscenity," then, embraces merely that form of expression which is beyond the purview of the First Amendment.

The state court's conclusion was amply warranted. The film portrays acts of sexual intercourse interspersed with irrelevant dialogue, showing incidents such as acts of sexual intercourse in the bathtub, manipulation of male genitals by the female in the shower ["rais[ing] it from a flaccid state to at least a semi-erect state" (see 124)], and intercourse on the bed [where "the audience saw the female astride the male, and assisting his erect penis into her vaginal area" (see 51-2)] (see 161). The entire picture is devoted to sexual activity in such a way that the court cannot be faulted for concluding that it appealed "to prurient, shameful or morbid interest in nudity [or] sex," and that it went "substantially beyond customary limits of candor in describing or in presenting such matters." N.Y. Penal Law §235.00(1).

And the finders of the facts, having heard the experts presented by the defense, properly rejected their testimony, stating that it "was not persuasive" (215-16), and concluded that the film "is utterly without redeeming social value." Penal Law §235.00(1). The experts claimed to find that value of the film was in its presentation of the "cool world's" attitude toward sex (Tyler), its view about sexual behavior (Winick), and its presentation of the political and social situation (Phillips). The trial court

could have rejected these theories, finding them to be no more than an attempt to find a use for the rambling, random "dialogue" in what would otherwise be a "stag film." Unlike the movie in *United States* v. *A Motion Picture Film Entitled "I am Curious (Yellow)"*, 404 F.2d 196 (2d Cir. 1968), where the court found an idea in the film and an attempt at artistic presentation, the film in question here has no such values. Indeed, even a movie such as "I am Curious," which has a plot, and, as the Second Circuit held, redeeming social value, has been held to be obscene in some jurisdictions. *Wagenheimer* v. *Maryland State Board of Censors*, 255 Md. 297, 258 A.2d 240 (1970); *aff'd, sub nom. Grove Press, Inc.* v. *Maryland State Board of Censors*, 401 U.S. 480 (1971) (equally divided court); see also *Karelexis* v. *Byrne*, 306 F. Supp. 1363 (D. Mass. 1969) (three-judge court), *rev'd on other grounds*, 401 U.S. 216 (1971). There is no predominant theme in "Blue Movie," except for the depicting of sexual acts. But even these acts do not have the redeeming value of being instructive or informative, as in *United States* v. *35 mm. Motion Picture Film Entitled "Language of Love," supra.* Nor does "Blue Movie" show merely titillating pictures of portions of the bodies of "actors" engaged in intercourse or merely photographs of naked women, which the Kentucky Supreme Court found obscene in "I, A Woman." *Cain* v. *Commonwealth*, 437 S.W.2d 769 (1969). Thus the Court's per curiam reversal in *Cain*, simply citing *Redrup, supra*, does not mean that the instant film is not obscene. *Cain* v. *Kentucky*, 397 U.S. 319 (1970).

Indeed "Blue Movie" is much like "Un Chant d'Amour," which was held to be obscene in *Landau* v.

Fording, 245 Cal. App.2d 820, 54 Cal. Rptr. 177 (1966), *aff'd*, 388 U.S. 456 (1967). Despite some expert testimony that the film dealt with prison problems, the California courts, as affirmed by this Court, upheld the conviction. There, as here, "none of the witnesses produced could agree on its dominant theme." 54 Cal. Rptr. at 182. The pictures here and in *Landau* are also similar because they are both by men whose other works have some value—"Un Chant d'Amour" was by Jean Genet, "Blue Movie" by Andy Warhol. But as the California court rejected Genet's prominence as a factor, noting, "the artistic merit of Genet's other works does not provide a carte blanche when he chooses to venture in the fields covered by the film" and that "great artists can create the type of hard core pornography proscribed" [*Landau* v. *Fording*, 54 Cal. Rptr. at 182], so did the trial court here reject Warhol's. The trial court found "that the motion picture in question is hard core pornography" (215). See *People* v. *Richmond County News*, 9 N.Y.2d 578 (1961); *People* v. *G.I. Distributors*, 20 N.Y.2d 104 (1967).

Petitioner relies upon *Stanley* v. *Georgia*, 394 U.S. 557 (1969), apparently on the theory that since adults could possess obscenity in their own home, he could display the movie. That argument has been rejected in *United States* v. *Reidel*, 402 U.S. 351 (1971).

Petitioner never challenged the findings that he "promoted" the film or that he knew its contents. Accordingly, his guilt of obscenity was established and the state court's finding on this issue presents no question worthy of review.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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